86-253

Supreme Court, U.S.
FILED
AUG 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN,
ET AL.,

Appellants,

v.

YAHN & MCDONNELL, INC. AND
THE PENNSTAR COMPANY, ET AL.,

Appellees.

On Appeal From The United States Court of Appeals
For The Third Circuit

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1401(a)(3)(A), provides that, after the trustees of a multiemployer pension plan have made an initial determination of an employer's liability upon withdrawal from the plan, their determination shall be accorded a presumption of correctness in any subsequent arbitration proceeding unless the employer shows by a preponderance of the evidence that the trustees' determination was unreasonable or clearly erroneous.

The question presented is whether Section 104(2) violates the Due Process Clause of the Fifth Amendment because of the supposed bias of the trustees.

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation and an agency of the United States, is an appellant. The PBGC was granted leave to intervene post-judgment by the court of appeals

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (PBGC JS[1] App. A, 1a-40a) is reported at 787 F.2d 128. The opinion of the district court (PBGC JS App. B, 41a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals (PBGC JS App. C, 50a-51a) was entered on March 31, 1986. The Pension Benefit Guaranty Corporation, a wholly-owned government corporation and an agency of the United States,

1. References to "PBGC JS" are to the Jurisdictional Statement of the Pension Benefit Guaranty Corporation, No. 86-231 (filed August 14, 1986), which seeks review of the same judgment.

was granted leave to intervene post-judgment for the purposes of seeking rehearing and, if necessary, review in this Court (PBGC JS App. D, 52a-53a). The PBGC's petition for rehearing was denied on April 23, 1986 (PBGC JS App. E, 54a-55a). The petition for rehearing of the United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan (the Plan), *et al.*, was also denied on April 23, 1986 (App. A, *infra*, A-1). The PBGC filed a notice of appeal to this Court on May 21, 1986 (PBGC JS App. F, 56a-57a). The Plan also filed a notice of appeal to this Court on May 21, 1986 (App. B, *infra*, A-2). On July 9, 1986, Justice Brennan extended the time for docketing the PBGC's appeal to and including August 19, 1986. On July 11, 1986, Justice Brennan extended the time for docketing the Plan's appeal to and including August 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1252.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1001 *et seq.*, are set forth at PBGC JS App. H, 60a-67a.[2] The provision of the statute held unconstitutional by the court of appeals is Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. §1401(a)(3)(A), which provides:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a

2. ERISA was recently amended, in respects not relevant to this case, by the Single-Employer Pension Plan Amendments Act of 1986, enacted as Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 237 *et seq.*

preponderance of the evidence that the determination was unreasonable or clearly erroneous.

STATEMENT

The appellee employers, Yahn & McDonnell, Inc. ("Yahn") and The Pennstar Company ("Pennstar") challenged the constitutionality of the withdrawal liability assessed by the Plan as a result of Yahn's withdrawal from the Plan in November, 1981. The statutory background to the Plan's assessment of liability is set forth adequately in Part A of the Statement in the JS filed by the PBGC. The statutory process followed by the Plan in assessing the liability against Yahn is as described by the PBGC in Part B of the Statement in the JS filed by the PBGC. The facts of this case are as presented in Part C of the Statement in the JS filed by the PBGC. The Plan adopts the contents of the PBGC's JS under the heading "Statement."

THE QUESTION IS SUBSTANTIAL

The decision of the Third Circuit conflicts with the decisions of five other court of appeals. See *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985) (en banc); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), cert. denied, 105 S. Ct. 2116 (1985); *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir.), cert. denied *sub nom. Sibley, Lindsay & Curr Co. v. Bakery, Confectionery & Tobacco Workers Int'l*, 104 S. Ct. 3554 (1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir.), cert. denied, 104 S. Ct. 3553 (1984). For this reason alone, this Court should note probable jurisdiction to resolve a conflict among the circuits.

The court of appeals erred in relying on the "biased decisionmaker" cases decided by this Court, and the result it reached threatens substantially to increase the number and complexity of arbitration proceedings which multiemployer pension plans will be subjected to by employers objecting to their liability. Such a result will seriously interfere with the enforcement of employer obligations under the MPPAA. The question presented in thus of substantial practical importance and warrants plenary review by this Court.

The Plan adopts the reasoning and analysis presented by the PBGC in its JS under the heading "The Question Is Substantial" and urges this Court to note probable jurisdiction for the reasons set forth by the PBGC, as well as those set out above.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1035 & 1065

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN AND ROBERT E. ZIMMER, MICHAEL PAOLELLA, JOHN P. MORRIS AND JAMES SMITH, JR., TRUSTEES OF THE UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN,
Appellees/Cross-Appellants

v.

YAHN & MCDONNELL, INC. AND THE PENNSTAR COMPANY,
Appellants in 85-1035/Cross Appellees

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, ROSENN,* *Circuit Judges*

The petition for rehearing filed by Appellees/Cross-Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judges Seitz, Gibbons, Garth, and Sloviter would grant the petition for rehearing.

By the Court,

/s/ Edward R. Becker

Judge

Dated: April 23, 1986

*As to panel rehearing only.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-1035 and 85-1065

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN AND ROBERT E. ZIMMER, MICHAEL PAOLELLA, JOHN P. MORRIS AND JAMES SMITH, JR., TRUSTEES OF THE UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL 115 PENSION PLAN,

Appellants in No. 85-1065

and

PENSION BENEFIT GUARANTY CORPORATION,

Intervenor

vs.

YAHN & MCDONNELL, INC. AND THE PENNSTAR COMPANY,

Appellants in No. 85-1035

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. §1252, United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan et al., Appellees/Cross-Appellants, hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on March 31, 1986, in the above-captioned matter.

Respectfully submitted,

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